Supreme Court, U.S.
FILED
DEC 10 2014
OFFICE OF THE CLERK

No. 14-103

IN THE
# Supreme Court of the United States

BAKER BOTTS L.L.P. AND JORDAN, HYDEN, WOMBLE, CULBRETH & HOLZER P.C., PETITIONERS

*v.*

ASARCO LLC

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## *AMICUS CURIAE* BRIEF OF THE STATE BAR OF TEXAS BANKRUPTCY LAW SECTION IN SUPPORT OF PETITIONERS

WILLIAM L. WALLANDER
KATHERINE DRELL GRISSEL
VINSON & ELKINS LLP
*2001 Ross Ave., Suite 3700*
*Dallas, TX 75201*
*(214) 220-7700*

JOHN P. ELWOOD
*Counsel of Record*
VINSON & ELKINS LLP
*2200 Pennsylvania Ave., NW, Suite 500 West*
*Washington, DC 20037*
*(202) 639-6500*
*jelwood@velaw.com*

*Counsel for Amicus Curiae*

## TABLE OF CONTENTS


Page

Table of Authorities ..... II

Interest of *Amicus Curiae* ..... 1

Summary of Argument ..... 3

Argument ..... 5

A. Section 330(a)(4)(A) Does Not Prohibit Allowance Of Compensation For Services Found Not To Benefit The Estate Where Fees Incurred Are For Services That Are Necessary To The Administration Of The Case ..... 5

B. The Fifth Circuit's Rule Burdens Estate Officers And Incentivizes Fee Structuring Arrangements That Impose Costs On All Bankruptcy Estates ..... 16

C. The Fifth Circuit's Ruling Will Increase Meritless Fee Litigation ..... 18

D. The Issue Is Of National Importance To All Officers ..... 20

Conclusion ..... 21

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Barron & Newburger, P.C.* v. *Tex. Skyline, Ltd. (In re Woerner)*, 758 F.3d 693 (5th Cir. 2014) ..... 8

*Grant* v. *George Schumann Tire & Batt. Co.*, 908 F.2d 874 (11th Cir. 1990) ..... 7

*In re NuCorp Energy, Inc.*, 764 F.2d 655 (9th Cir. 1985) ..... 15, 16

*In re Worldwide Direct*, 334 B.R. 108 (Bankr. D. Del. 2005) ..... 13

*Matter of Pro-Snax Distributors, Inc.*, 157 F.3d 414 (5th Cir. 1998) ..... 7, 8

*Schane* v. *Int'l Brotherhood of Teamsters Union Local No. 710 Pension Fund Pension Plan*, 760 F.3d 585 (7th Cir. 2014) ..... 10

*Smith* v. *Edwards & Hale, Ltd. (In re Smith)*, 317 F.3d 918 (9th Cir. 2002) ..... 8, 15, 16

*U.S.* v. *One 1973 Rolls Royce, V.I.N. SRH-16266*, 43 F.3d 794 (3d Cir. 1994) ..... 10

**Statutes**

11 U.S.C. § 327 ..... 20

11 U.S.C. § 327(a) ..... 20

11 U.S.C. § 330 ..... *passim*

11 U.S.C. § 330(a) ..... *passim*

11 U.S.C. § 330(a)(1) ..... 3, 5, 14

11 U.S.C. § 330(a)(2) ..... 3, 5, 12
11 U.S.C. § 330(a)(3) ..... 5, 6
11 U.S.C. § 330(a)(3)(C) ..... 11
11 U.S.C. § 330(a)(3)(F) ..... 7
11 U.S.C. § 330(a)(4) ..... 6, 7, 14
11 U.S.C. § 330(a)(4)(A) ..... *passim*
11 U.S.C. § 330(a)(4)(A)(i) ..... 10
11 U.S.C. § 330(a)(4)(A)(ii) ..... *passim*
11 U.S.C. § 330(a)(4)(A)(ii)(I) ..... 8, 10
11 U.S.C. § 330(a)(4)(A)(ii)(II) ..... *passim*
11 U.S.C. § 330(a)(6) ..... *passim*
11 U.S.C. § 332 ..... 20
11 U.S.C. § 333 ..... 20
11 U.S.C. § 503(b)(2) ..... 13
11 U.S.C. § 1102 ..... 20
11 U.S.C. § 1103 ..... 20
11 U.S.C. § 1103(a) ..... 20

**Other Authorities**

78 F.R. 36248-02, 2013 WL 2902995 (F.R.), at *36255 (June 17, 2013) ..... 18

Collier on Bankruptcy (Alan Resnick & Henry J. Sommer eds., 16th ed.) ..... 15

Federal Rule of Bankruptcy Procedure 2016 ..... 12

Federal Rule of Bankruptcy Procedure 9011 ..... 19

H.R. Rep. No. 95-595, at 11 U.S.C. § 330 (1977) ... 17

Lubben, Stephen J., *Chapter 11 Professional Fee Study* 35 (American Bankruptcy Institute, 2007) ..... 20

*Presentation of the Landmark ABI Fee Study: Conclusions and Ramifications* 8, ¶¶ 15-16 (American Bankruptcy Institute, Winter Leadership Conference 2007) *available at* http://goo.gl/zZltxr ..... 20

Scalia, Antonin & Garner, Bryan A., *Reading Law: The Interpretation of Legal Texts* (2012) ..... 9

Solan, Lawrence M., *The Language of Judges* (1993) ..... 10

State Bar of Texas Board of Directors Policy Manual 5 (Revised Jan. 2014) ..... 1

TBLS Mission Statement, *available at* http://www.statebaroftexasbankruptcy.com ..... 2

U.S. Bankruptcy Courts – Business and Nonbusiness Cases Commenced by Chapter of the Bankruptcy Code During the 12-Month Period Ending June 30, 2014, *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2014/0914_f.pdf ..... 19

Warner, G. Ray & Shapiro, Keith J., *American Bankruptcy Institute, National Report on Professional Compensation in Bankruptcy Cases* (LRP Publications, 1991). ..... 17

## INTEREST OF *AMICUS CURIAE*[1]

The State Bar of Texas was created to "provide specialized professional advice to those with the ultimate responsibility of governing the legal profession in serving the public" and has the stated mission to "support the administration of the legal system, assure all citizens equal access to justice, foster high standards of ethical conduct for lawyers, enable its members to better serve their clients and the public, educate the public about the rule of law and promote diversity in the administration of justice and the practice of law."[2] The State Bar of Texas authorizes and maintains various sections "for the purpose of promoting the objectives of the State Bar within the particular field designated by the bylaws of each section."[3]

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to this filing.

Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of TBLS. No judicial member of TBLS participated in the decision to file this brief, nor did any such member review it before filing (including Richard S. Schmidt, United States Bankruptcy Judge for the Southern District of Texas, who presided over the ASARCO LLC bankruptcy case). Counsel for petitioner Baker Botts L.L.P., Omar Alaniz, is Vice-President-Professional Education of TBLS, but he did not participate in the decision to file this brief or review it before filing.

[2] State Bar of Texas Board of Directors Policy Manual 5 (rev. Jan. 2014), *available at* http://goo.gl/tGH3Sa.

[3] *Id.* at § 5.01.01.

*Amicus curiae*, the State Bar of Texas Bankruptcy Law Section (the "TBLS") is a section within the State Bar of Texas that was organized approximately ten years ago and currently has approximately 1,500 members who are attorneys licensed to practice law in the State of Texas.[4] TBLS has the stated purposes of (a) providing a platform for practitioners of bankruptcy law (wherever located) who are licensed to practice law in the State of Texas to exchange information and ideas on a regular basis and (b) providing opportunities for lawyers practicing bankruptcy law to attain and build upon the skills, experience, and relationships that will enhance the practice of bankruptcy law in the State of Texas.[5]

This case presents the question whether 11 U.S.C. § 330(a),[6] which addresses the compensation of officers, *prohibits* a bankruptcy judge from compensating an officer for the defense of its fee application. While this case involves attorney compensation, § 330(a) governs the compensation of *all* officers; thus, the answer to the question presented will directly affect the compensation of all officers—a much broader group than attorneys—and also will have a substantial impact on the structuring of fee arrangements between bankruptcy attorneys and their trustee, debtor in possession, and official committee-clients.

---

[4] Membership in TBLS is also open to non-attorney members.

[5] See TBLS Mission Statement, *available at* http://www.statebaroftexasbankruptcy.com.

[6] Unless otherwise indicated, statutory citations refer to the United States Bankruptcy Code, Title 11 of the United States Code.

The Fifth Circuit's decision below, which disallows compensation for fee application defense services, misinterprets the compensation standards under § 330 and has an adverse impact on the compensation of officers in the administration of bankruptcy cases. The decision has direct adverse consequences for attorneys who are licensed to practice law in the State of Texas (many of whom practice in bankruptcy courts nationwide) and are engaged to represent, among others, a trustee, debtor in possession, or official committee in a bankruptcy case filed in the Fifth Circuit. Accordingly, TBLS files this brief as *amicus curiae* and urges this Court to reverse the Fifth Circuit's ruling.

## SUMMARY OF ARGUMENT

Bankruptcy Code § 330(a)(1) broadly authorizes bankruptcy courts to award reasonable compensation for actual, necessary services rendered by officers, including professional persons, absent an explicit statutory prohibition. A proper reading of the provision that creates limited exceptions to the court's discretionary officer compensation authority, § 330(a)(4)(A), demonstrates that it does not prohibit compensating officers for defense-of-fee-application litigation, which is necessary to the administration of a bankruptcy case. Notably, even though the Bankruptcy Code does not prohibit allowance of such compensation, it does not guarantee its payment, which is subject to the discretion of the bankruptcy court, and § 330(a)(2) expressly provides that a bankruptcy court can award compensation less than the amount requested. Thus, there is express statutory protection of the estate and interested

parties with respect to any award of officer compensation.

The Fifth Circuit's conclusion that § 330 prohibits allowance of compensation for the defense of fee applications should be reversed because the court did not properly consider whether such compensation may be allowed because it is necessary to administration of the case under § 330(a)(4)(A)(ii)(II). Rather, the Fifth Circuit analyzed only whether the services rendered benefitted the debtor's estate in its analysis of § 330(a)(4)(A)(ii). The Fifth Circuit erred because § 330(a)(4)(A)(ii) provides that fees are non-compensable only if *two* criteria are met: (I) the services were not likely to benefit the estate *and* (II) the services were not necessary to the administration of the case. Defending objections to fee applications and related litigation are necessary to the administration of a bankruptcy case under chapter 3 of the Bankruptcy Code (entitled "Case Administration") given that compensation disputes require resolution under § 330(a) as an integral part of bankruptcy case administration. Thus, such compensation for fee application defense may be awarded by a bankruptcy court in its discretion under § 330(a).

The Fifth Circuit's interpretation of § 330(a) unfairly penalizes officers and incentivizes them to increase their fees to account for the potential cost of resolving compensation disputes and then pass on those costs to all bankrupt estates and their creditors, a patently inequitable result.

The Fifth Circuit's decision should be reversed.

## ARGUMENT

This Court should reverse the Fifth Circuit ruling below due to its erroneous application of § 330(a)(4)(A), and to eliminate its potentially far-reaching negative repercussions for bankruptcy law practitioners and other officers.

### A. Section 330(a)(4)(A) Does Not Prohibit Allowance Of Compensation For Services Found Not To Benefit The Estate Where Fees Incurred Are For Services That Are Necessary To The Administration Of The Case

1. Situated in chapter 3 of Title 11 of the United States Code (entitled "Case Administration"), subchapter II (entitled "Officers"), § 330(a) governs the compensation of officers, and it grants bankruptcy courts discretion to award compensation subject to certain enumerated exceptions. Specifically, § 330(a) provides that a court "*may* award" to officers "*reasonable compensation for actual necessary services rendered*" and may "award compensation that is less than the amount of compensation that is requested." 11 U.S.C. § 330(a)(1), (2) (emphasis added). It then sets forth a list of factors for the court to consider when evaluating the amount of compensation requested, including "whether the services were necessary to the administration of, *or* beneficial at the time at which the service was rendered toward the completion of, a case under this title." *Id.* at § 330(a)(3) (emphasis

added).[7] Section 330(a) further places certain limitations on the amount of compensation for preparation of a fee application, stating that "[a]ny compensation awarded for the *preparation of* a fee application shall be based on the level and skill reasonably required to prepare the application." *Id.* § 330(a)(6) (emphasis added).

Section 330(a)(4) sets forth a limited number of exceptions to the bankruptcy court's discretion to award "reasonable compensation." It provides, in pertinent part:

> * * * [T]he court shall not allow compensation for
>
> (i) unnecessary duplication of services; or
>
> (ii) services that were *not* –
>
> (I) reasonably likely to benefit the debtor's estate; *or*
>
> (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A) (emphasis added). It follows that, where fees and expenses incurred are necessary to the administration of the case, even if they are not found to have benefitted the estate, § 330(a)(4)(A)(ii) does not prohibit their allowance.

---

[7] Section 330(a)(3) and existing case law (the so-called "lodestar" test) contain factors to be considered with respect to the amount of fees and expenses that may be allowed, see Pet. App. 5a-7a, and those factors may well lead a bankruptcy court to reduce or disallow payment of requested fees and expenses, depending on the circumstances of the case.

2. The Fifth Circuit's opinion below considered whether petitioners' requested compensation was prohibited from being allowed under § 330(a)(4)(A) and *referenced* both the benefit-to-the-estate test and the necessary-to-case-administration test set forth in § 330(a)(4)(A)(ii), stating that "professional services are compensable only if they are likely to benefit a debtor's estate or are necessary to case administration."[8] See Pet. App. 14a, 15a. However, in making its ruling, the Fifth Circuit erred by only *applying* the "benefit to the estate" prong of the § 330(a)(4)(A)(ii) test. Pet. App. 14a, 15a. The court reasoned that petitioners' fees are not compensable because the fees "brought absolutely no *benefit to the estate, the creditors, or the debtor.*" *Id.* at 15a (quoting *Grant* v. *George Schumann Tire & Batt. Co.*, 908 F.2d 874, 882-83 (11th Cir. 1990)) (emphasis added).[9]

---

[8] The court makes what seems to be two additional references to § 330(a)(4) that actually appear to be typographical errors. On one occasion, the court cites to § 330(a)(4), but by the context of the substantive discussion in that paragraph, it is clear the court intended to reference § 330(a)(6). See Pet. App. 16a. On another, the court again erroneously cites to § 330(a)(4) when addressing arguments relating to the reasonableness of the *amount* of a claim for compensation under the "comparability factor," an apparent reference to § 330(a)(3)(F). See Pet. App. 18a.

[9] The Fifth Circuit, citing to its prior decision in *Matter of Pro-Snax Distributors, Inc.*, 157 F.3d 414, 418 n.7 (5th Cir. 1998), reached its conclusion on the understanding that, normally, creditors bear the cost of defense (even though, in this case, creditors bore none of that cost as they were paid in full). Pet. App. 15a. The *Pro-Snax* footnote referencing § 330(a)(4)(A), which is cited in the opinion below, was included in the *Pro-*

The court then appeared to reject the argument—embraced by the Ninth Circuit in the case on the other side of the circuit split that prompted this Court's review—that "because resolving professional fees is required to close a case, their litigation is a reasonable and necessary aspect of case administration." Pet. App. 16a (citing *Smith* v. *Edwards & Hale, Ltd. (In re Smith)*, 317 F.3d 918, 929 (9th Cir. 2002)). But rather than engaging that argument on the merits, the Fifth Circuit dismissed out of hand the idea that there might be a "broader scope" for the "reasonableness and necessity of services *to the debtor's estate*" and that the "benefit to the estate" view "more closely reflect[ed]" the "statute's plain meaning." *Id.* at 16a. By focusing exclusively on the "reasonableness and necessity *to the debtor's estate*," *ibid.*; compare § 330(a)(4)(A)(ii)(I) (prohibiting payment of fees for "services that were not * * * reasonably likely to benefit *the debtor's estate*") (emphasis added), the Fifth Circuit read out

---

*Snax* opinion in support of the statement that "an attorney's work *must* benefit the estate before any compensation is payable * * * " *Pro-Snax*, 157 F.3d at 418. But that statement is wrong, as discussed *infra*, because, in order to be saved from disallowance under § 330(a)(4)(A), fees *must* be for services that benefit the estate *only* if those fees are *not* for services that are "necessary to the administration of the case" under §330(a)(4)(A)(ii)(II). The *Pro-Snax* test that currently prevails in the Fifth Circuit is a more stringent test than is employed in other circuits; however, the Fifth Circuit recently granted rehearing *en banc* to reconsider that standard. See *Barron & Newburger, P.C.* v. *Tex. Skyline, Ltd. (In re Woerner)*, 758 F.3d 693 (5th Cir. 2014) (Prado, J., joined by Reavley and Owen, J.J., specially concurring) (urging full court to reconsider *Pro-Snax* standard *en banc*).

of the statute subclause II of § 330(a)(4)(A)(ii), which expressly requires analysis not only of the benefit to the estate, but also whether the services were "necessary to administration of the case." 11 U.S.C. § 330(a)(4)(A)(ii)(II).[10]

3. The reason both subclauses of § 330(a)(4)(A)(ii) must be considered in determining whether compensation for fee defense is prohibited is because it contains a negation of the disjunctive. While, ordinarily, "[u]nder the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012), a provision that begins with a negative "can cause subtle interpretive problems" regarding the meaning of the normally disjunctive "or." *Ibid.* Indeed, it appears it is such a "subtle interpretive problem" involving the word *or* that undermines the soundness of the decision below.

As Scalia and Garner explain, under what has been called "DeMorgan's Theorem," because the provision begins with a negation of what follows, *not (I) or (II)* means *not (I) and not (II).* See *id.* at 119 ("'not A, B, or C" means "not A, not B, *and* not C'"); see also *Schane* v. *Int'l Brotherhood of Teamsters*

---

[10] From that point on, the opinion's analysis focuses on the "reasonableness and necessity *to the debtor's estate*" rather than on the reasonableness and necessity to the administration of the case. Toward the end, the opinion states in passing that "as has been discussed, Section 330 is not fairly read to include 'fees for defense of fees' * * * as reasonable, necessary costs of case administration," but the opinion actually previously only discussed whether the fees were of *benefit to the estate*. See *id.* at 20a.

*Union Local No. 710 Pension Fund Pension Plan*, 760 F.3d 585, 589 (7th Cir. 2014) ("In propositional logic, this move – the rule of inference that *not (X or Y)* is equivalent to *not X and not Y* – is known as one of 'De Morgan's Laws.'") (citing Lawrence M. Solan, *The Language of Judges* 49 (1993)); *U.S.* v. *One 1973 Rolls Royce, V.I.N. SRH-16266*, 43 F.3d 794, 815 (3d Cir. 1994) ("Under DeMorgan's Theorem the denial of the alternation [not (A or B)] is equivalent to the conjunction of the denials [not A and not B]."). Accordingly, the conditions of both subclauses (I) and (II) of § 330(a)(4)(A)(ii) must be met before a bankruptcy court is prohibited from allowing compensation to officers.

Thus, according to *DeMorgan's Theorem*, § 330(a)(4)(A)(ii)[11] is to be read as:

| Action | Condition #1 (§330(a)(4)(A)(ii)(I)) | Condition #2 (§330(a)(4)(A)(ii)(II)) |
|---|---|---|
| The court shall not allow compen-sation *if* | The compensation is for services that were not reasonably likely to benefit the debtor's estate *and* | The compensation is for services that were not necessary to the administration of the case. |

[11] Section 330(a)(4)(A)(i), prohibiting the allowance of compensation for the "unnecessary duplication of services," is not at issue here. Under DeMorgan's Theorem, § 330(a)(4)(A) would prohibit payment of compensation if the services were "unnecessar[il]y duplicat[ive]" under § 330(a)(4)(A)(i), *or* if the services were *both* not beneficial to the estate *and* not necessary to the administration of the case under § 330(a)(4)(A)(ii).

Thus, in order for the § 330(a)(4)(A)(ii) prohibition to apply, it must be shown that the services requested to be compensated are *both* not of benefit to the estate *and* not necessary to the administration of the case. The Fifth Circuit erroneously focused only on the first condition, and its resulting analysis is, therefore, flawed.

Furthermore, the Fifth Circuit's erroneous requirement that compensation *must* be for services that benefit the estate without consideration of whether, alternatively, those services are necessary to the administration of a case, effectively renders superfluous § 330(a)(3)(C), which provides that in determining the *amount* of compensation, the court may consider "whether the services were *necessary to the administration of*, or beneficial" toward the *completion of a case*, at the time they were rendered. See 11 U.S.C. §330(a)(3)(C) (emphasis added). Under the Fifth Circuit's reading of § 330(a)(4)(A)(ii), a bankruptcy court could never award compensation for services relating purely to the administration of a bankruptcy case notwithstanding a finding that the requested compensation is reasonable in amount based solely on § 330(a)(3)(C).

Thus, even if petitioners' fee-application defense did not benefit the estate, as the Fifth Circuit concluded,[12] the bankruptcy court was not

---

[12] *Amicus* does not agree with the Fifth Circuit's conclusion and, thus, does not concede that the fees incurred did not benefit the estate; on the contrary, they were expended toward determining the amount of compensation owed for professional fees under procedures required by the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, which, in this case,

categorically barred from allowing such compensation under § 330(a)(4)(A) because the defense was necessary to the administration of the case.

4. Reviewing the fee application process and its importance to case administration helps to confirm the necessity of fee application defense work. In practice, in order to comply with § 330 and satisfy the detailed requirements of Rule 2016 of the Federal Rules of Bankruptcy Procedure, officers submit detailed, formal "fee applications" to the bankruptcy court for approval under § 330. Interested parties (as authorized by § 330(a)(2)) may object to the requested fees. If such objections are not resolved consensually among the parties involved, the bankruptcy court holds a hearing, as happened in this case. Objections to the requested compensation of officers are an ordinary part of the case administration process by which officers are compensated (though, in practice, most fee objections are not as extensive as those asserted in the instant case). See *infra* discussion at section C.

The fee application, any objections, consideration and resolution by the bankruptcy court of the application and any objections, and final authorization of the payment of officer compensation, together, comprise a critical piece of a bankruptcy court's administration of a bankruptcy case, in accordance with the Bankruptcy Code and Federal Rules of Bankruptcy Procedure, and, thus, all fall

---

were fees to defend compensation to a law firm that, under any standard of measure, provided superior results to the estate and its creditors in the face of substantial complexity, adversity, and cost.

within § 330(a)(4)(A)(ii)(II). See Pet. App. 47a (quoting *In re Worldwide Direct*, 334 B.R. 108, 111-12 (Bankr. D. Del. 2005) (explaining that the "no benefit to the estate" argument is not the only premise for awarding fees after confirmation because such a dispute "must be dealt with as part of the administration of the case" and thus may be allowed as fees "necessary to the administration of th case" under § 330(a)(4)(A)(ii)(II))).[13] Furthermore, any court-approved compensation to be paid to officers is statutorily granted "administrative expense" status under § 503(b)(2), which allows for their payment ahead of other unsecured creditors in the process of administering the bankruptcy case. See 11 U.S.C. § 503(b)(2) (providing for the allowance of administrative expenses for "compensation and reimbursement awarded under section 330(a) of this title").

5. The Fifth Circuit misconstrued § 330(a)(6) as a basis for categorically disallowing fees incurred defending a fee application, see Pet. App. 16a, concluding that compensation for defense of fees could not be fit into subsection (a)(6) because that subsection "is clearly different from authorizing fees for the defense of the application in a court hearing,"

---

[13] In the decision below, the Fifth Circuit hypothesized generally that professionals who properly submit detailed, itemized billing records in compliance with the Federal Rules of Bankruptcy Procedure "ordinarily" will face fewer fee challenges, and that any such satellite litigation that is instituted "ordinarily" will be less successful. See *id.* at 17a. But, that "ordinar[]y" circumstance did not occur in the case below in which substantial retributive objections were lodged despite adherence to those procedures.

and "tailoring the award to the 'level and skill reasonably required to prepare the application' emphasizes scrivener's skills over other professional work." *Ibid.*[14] The court's reading is flawed because it fundamentally misunderstands the permissive and general nature of § 330(a), as well as the nature of § 330(a)(6). Section 330(a)(6) does not itself *authorize* payment of fees for fee application preparation, rather, it limits the amount of such payment of "[a]ny compensation awarded" under the general provisions of § 330(a) such that it is "based on the level and skill reasonably required to prepare the application." 11 U.S.C. § 330(a)(6).[15] Compensation for such fees would be awarded—just as compensation for defense fees—under the general permissive authority of § 330(a)(1). Indeed, the fact that § 330(a)(6) clearly contemplates that compensation for the *preparation of a fee application* could permissibly be paid under the "benefit" and "necessity" tests of § 330(a)(4), strongly supports the idea that *defense* of a fee application could likewise satisfy the requirements of that provision. Certainly, § 330(a)(6) cannot be read to imply a *prohibition* on compensation for defense of fee applications, a subject that provision simply does not address.

---

[14] See Pet. App. 16a. As mentioned *supra* at n.8, the Fifth Circuit's discussion of § 330(a)(6) appears to contain a typographical error as it references § 330(a)(4) rather than § 330(a)(6).

[15] The proscription that fees awarded for the *preparation* of fee applications be limited to the "level and skill reasonably required to prepare" such an application under § 330(a)(6) serves to prevent persons with high hourly rates from billing excessive amounts for a relatively ministerial task.

The Ninth Circuit's decision in *Smith* strongly supports this conclusion, correctly determining that nothing in the language of § 330 (including § 330(a)(6)) forbids compensation for the defense of fee applications if such compensation otherwise meets the requirements of § 330. *In re Smith*, 317 F.3d at 928. Moreover, that conclusion is consistent with prior Ninth Circuit precedent in *In re NuCorp Energy, Inc.*, 764 F.2d 655, 659 (9th Cir. 1985), which was "codif[ied]" by the legislative enactment of § 330(a)(6). See 3 Collier on Bankruptcy ¶ 330.03 [16][a][i] (Alan Resnick & Henry J. Sommer eds., 16th ed.) ("Section 330(a)(6), added to the [Bankruptcy] Code in 1994, represents a codification of *NuCorp* * * * "). In *NuCorp*, the Ninth Circuit ruled that professionals' costs to comply with fee *application* requirements in bankruptcy courts are necessarily compensable under § 330 because they are "actual and necessary services," and the court further explained, in dicta, that time spent *litigating* fee awards should also be compensable for the same reasons. See *NuCorp*, 764 F.2d at 658-62; *Smith*, 317 F.3d at 928.

Contrary to the Fifth Circuit's mistaken conclusion that compensation for fee application defense is categorically prohibited under § 330(a) because it does not generally benefit bankruptcy estates, see Pet. App. 1a-21a, the Ninth Circuit correctly concluded that such compensation may be authorized under § 330(a) because such fees are "necessary for the administration of the case" *and* also "provide[] a benefit to the debtor's estate in determining the amount of administrative fees that the estate owe[s]." *In re Smith*, 317 F.3d at 928-29.

This rationale fully accords with *NuCorp*, which explained that its rationale is consistent with the legislative intent behind § 330 of ensuring (a) compensation for bankruptcy attorneys commensurate with that earned by attorneys in non-bankruptcy cases and (b) the repudiation of judicial decisions holding that compensation of attorneys in bankruptcy proceedings was subject to the overriding concern of preserving the estate. See *Smith*, 317 F.3d at 928; *NuCorp*, 764 F.2d at 658-62.

In summary, there is nothing in § 330(a) that prohibits compensation for defense of fee applications. Such compensation is necessary to case administration under § 330(a)(4)(A)(ii)(II), and, thus, it is not disallowed under § 330(a)(4)(A). Because the Fifth Circuit's opinion did not substantively address the case administration aspect of the fees at issue, its ruling conflicts with the language of § 330(a) and should be reversed.

### B. The Fifth Circuit's Rule Burdens Estate Officers And Incentivizes Fee Structuring Arrangements That Impose Costs On All Bankruptcy Estates

The Fifth Circuit's decision below that officers can never be compensated under § 330(a) for defending their fee applications in bankruptcy cases incentivizes professional persons to implement higher fee structures, to be borne by future trustee, debtor in possession, or official committee-clients, or else face fee dilution. This unpalatable reality is readily apparent in the Fifth Circuit's acknowledgement that: "When firms become aware that they may not be reimbursed for defending core fee applications [in

the Fifth Circuit], they can anticipate this possibility in their hourly rates and by thoroughly documenting fee applications." Pet. App. 18a n.7.

As an empirical matter, it is not clear whether that will happen. An American Bankruptcy Institute ("ABI") report on professional compensation published in 1991 (the "Report") noted that the survey data from judges and lawyers "suggest that professionals have not adjusted their hourly rates in those districts where no such compensation [for defense of fee applications] is available." G. Ray Warner & Keith J. Shapiro, *American Bankruptcy Institute National Report on Professional Compensation in Bankruptcy Cases*, 61 & n.49 (LRP Publications, 1991), *available at* http://goo.gl/Eqryym. In the Report, which reflects the most recent relevant data gathered on this issue, the ABI observes that: "One might expect that professionals who do not generally receive compensation for the time spent preparing *and presenting* fee application[s] might adjust their hourly rates upward to recover this cost. The survey data, however, do not indicate that lawyers have responded in this fashion." *Id.* at 198 (emphasis added), *available at* http://goo.gl/5uPpQM.

Unless rates *are* adjusted to account for the possibility of fee dilution in the face of fee objections, there is a real risk that bankruptcy practitioners "will not remain in the bankruptcy field."[16] Indeed, the legislative history makes clear that, in amending § 330, Congress sought parity with non-bankruptcy practitioners for the very purpose of avoiding that

---

[16] See H.R. Rep. No. 95-595, at 330 (1977).

result.[17] The effect of uncompensated fees for defense of fees falls especially hard on smaller bankruptcy firms, which, because of their size, are unable to spread the risk of undercompensation against a greater number of cases.

Moreover, building in a safety net through higher fees charged to trustee, debtor in possession, or official committee-clients in all cases unfairly burdens those bankruptcy estates whose professionals ultimately do not face fee objections that must be defended. This outcome is inequitable and further supports the need for bankruptcy courts to utilize the discretion they have been given in § 330 to award compensation for defense of fee applications in those cases where the facts justify doing so. Moreover, such risk-adjusted higher fees may well run afoul of the recently implemented United States Trustee Guidelines that require evidence that rates charged are not higher merely because the case arose in bankruptcy. See 78 F.R. 36248-02, 2013 WL 2902995 (F.R.), at *36255 (June 17, 2013).

### C. The Fifth Circuit's Ruling Will Increase Meritless Fee Litigation

The filing and administration of bankruptcy cases, and the related compensation of officers under § 330, constitute a substantial nationwide legal practice.

---

[17] *Id.* (explaining that § 330 is intended to incentivize "bankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously" to keep practicing law in the "bankruptcy arena" in order to prevent the field from being occupied only by attorneys who could not find other work or who practice bankruptcy law occasionally "almost as a public service").

According to federal government figures for 2013 and 2014, approximately one million bankruptcy cases are filed in the United States each year, and roughly 1.4 to 1.5 million bankruptcy cases are pending at any given time.[18] If allowed to stand, the Fifth Circuit's decision will give trustees, debtors, reorganized debtors, and other parties in interest incentives to challenge the fees of officers for the purpose of reducing the net fees those officers will be paid for their services. The perverse incentive to threaten litigation that, even if unsuccessful, will result in unpaid legal fees and expenses will likely increase fee litigation because objectors will face zero risk of bearing the cost of paying the fees and expenses for fee defense.[19]

Indeed, the fees of officers are already frequently litigated. According to an ABI study based on cases filed in 2004, in approximately 10% of chapter 11 cases, parties objected to the lead debtor's counsel's fees, and in large chapter 11 cases, that percentage swelled to almost 20%. See *Presentation of the Landmark ABI Fee Study: Conclusions and Ramifications* 8, ¶¶ 15-16 (American Bankruptcy Institute, Winter Leadership Conference 2007),

---

[18] See U.S. Bankruptcy Courts – Business Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2013 and 2014, *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2014/0914_f.pdf.

[19] Although Rule 9011 of the Federal Rules of Bankruptcy Procedure may prevent some meritless objections to officer compensation, objections, nevertheless, may be designed to dilute officer compensation without crossing the line into sanctionable behavior. See Pet. Br. 55.

*available at* http://goo.gl/zZltxr; Stephen J. Lubben (Reporter), *Chapter 11 Professional Fee Study* 35 (American Bankruptcy Institute, 2007). With changed incentives under the Fifth Circuit rule, such objections are likely to increase further.

### D. The Issue Is Of National Importance To All Officers

As the Fifth Circuit itself explicitly acknowledged, the issue before the Court affects *all* officers of a bankruptcy estate: "The issues presented transcend debtor's counsel, because Section 330(a) governs compensation of *all professionals* whose fees are paid by the bankruptcy estate" including "a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103," including any "attorney" and "any paraprofessional person employed by any such person * * * " Pet. App. 14a & n.6 (emphasis added).[20] Accordingly, affirmance of the Fifth Circuit's ruling would negatively affect the employment and compensation not only of attorneys in bankruptcy cases,[21] but also a host of other

---

[20] Professionals employable under § 327 extend to "attorneys, accountants, appraisers, auctioneers, or other professional persons." 11 U.S.C. § 327(a). Section 1103 addresses "attorneys, accountants, or other agents, to represent or perform services" for creditors' and equity security holders' committees appointed under § 1102. 11 U.S.C. § 1103(a); see also *id.* at § 1102.

[21] Furthermore, the term "attorneys" is not limited to bankruptcy practitioners. When a law firm is engaged to represent an estate, lawyers across many legal disciplines within that firm—finance, mergers & acquisitions, tax,

officers, such as trustees, ombudsmen, examiners, accountants, appraisers, financial advisors, sale advisors, and experts engaged by bankruptcy estates.

* * * * *

If the Fifth Circuit decision is not reversed, it will have significant impacts on bankruptcy practice nationwide by creating incentives to file meritless objections to fee applications. The resulting risk of nonpayment even for defending against fee challenges that *were found to lack merit* will, foreseeably, either drive restructuring professionals to new fields and industries, or force them to pass on these necessary "costs of doing business," Pet. App. 17a-18a, in the form of higher rates to be paid by every bankruptcy estate and its creditors. Fortunately, the language of § 330(a) does not require that result.

## CONCLUSION

The Fifth Circuit's ruling below should be reversed.

---

employment, environmental, commercial litigation, appellate, and securities, to name a few—are frequently involved in the representation working alongside and in collaboration with bankruptcy lawyers.

Respectfully submitted.

WILLIAM L. WALLANDER
KATHERINE DRELL GRISSEL
VINSON & ELKINS LLP
*2001 Ross Ave., Suite 3700*
*Dallas, TX 75201*
*(214) 220-7700*

JOHN P. ELWOOD
*Counsel of Record*
VINSON & ELKINS LLP
*2200 Pennsylvania Ave., NW, Suite 500 West*
*Washington, DC 20037*
*(202) 639-6500*
*jelwood@velaw.com*

*Counsel for Amicus Curiae*

DECEMBER 2014